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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1049

ARNOLD SCHULMAN,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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Petitioner seeks to have this Court review by writ of certiorari an order of the Appellate Term of the New York State Supreme Court, First Department, entered on May 15, 1972, which (2 to 1) affirmed a judgment of conviction of the New York City Criminal Court upon a charge of unauthorized filling in of wharf property.

In a certificate dated October 31, 1972, the New York Court of Appeals denied leave to appeal.

Issue Presented

Has petitioner twice been placed in jeopardy when he has been guilty of a continuing violation of law and when the second prosecution relates to a period of time not embraced in the first prosecution?

Facts

A detailed statement of facts is set forth in the opinion at the Appellate Term, found in Appendix A of petitioner's brief to this Court. We will reiterate only those facts strictly relevant to the issue of double jeopardy.

Petitioner owns certain waterfront property adjacent to Long Island Sound in City Island, New York. Such property is subject to regulation under New York City Charter §§ 704 and 712. Petitioner applied for, and was granted, a permit to fill in his lot with trap rock and earth fill in order to prevent erosion and protect his dwelling. This permit was granted with certain specified limitations. Petitioner exceeded these limitations and, as a result, was served with a criminal summons in October 1969 charging him with unauthorized filling in. He was convicted and fined $50 (R. 3-4).* No appeal was taken from this conviction.

Petitioner did not correct the unauthorized condition. On May 7, 1970, he was served with another summons charging him with unauthorized filling in (R. 5-8). He was found guilty, fined $50 and given three months to remove the violation (R. 128).

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* References are to numbers as they appear at the bottom of the pages of the Record.

On appeal, the Appellate Term sustained the conviction by a 2 to 1 vote (Pet's Append. A). The majority rejected petitioner's claim of double jeopardy (A4). The dissent did not pass on the issue (A8).

ARGUMENT

Petitioner was not placed in double jeopardy. He was guilty of a continuing violation, and the second prosecution related to a period of time not embraced in the first prosecution.

It is well settled that jeopardy attaches only when the second prosecution is for the same offense as the first and that, when the crime is a continuing one, conviction or acquittal bars subsequent prosecution only for offenses during the period considered in the prior case. *United States* v. *Bendik*, 220 F. 2d 249, 251 (2d Cir., 1955); *Self* v. *United States*, 150 F. 2d 745 (4th Cir., 1945); *People* v. *Brooklyn & Queens Transit Corp.*, 283 N. Y. 484, 495, 28 N. E. 2d 925, 930 (1940); *People* v. *Farson*, 244 N. Y. 413, 419, 155 N. E. 724, 726 (1927); *People ex rel. Lichtenstein* v. *Hodgson*, 126 N. Y. 647, 27 N. E. 378 (1891); 22 *C. J. S., Criminal Law* § 281.

This effectively disposes of petitioner's contention. As the Appellate Term stated (A4):

> "His [petitioner's] prior conviction for unauthorized filling-in on October 29, 1969 for which he paid a fine of $50., certainly could not be regarded as permission to maintain the unlawful condition indefinitely. When the violation charged is a continuing one, as here, conviction or acquittal bars later prosecution only for a like offense during the

time specified in the first charge * * *. The instant offense was the condition existing on May 7, 1970 which, of course, is subsequent and completely distinct from October 29, 1969, the time specified in the first charge."*

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* In the "Question Presented" on page 2 of his brief, petitioner lists only one issue on this petition for certiorari, namely, double jeopardy. On page 6 of his brief, however, he appears to raise a second issue when he states that the Appellate Term decision was in conflict with *Appleby* v. *City of New York*, 271 U. S. 364 (1926); and *Appleby* v. *Delaney*, 271 U. S. 403 (1926), involving the application of Article 1, § 10, of the United State Constitution. No constitutional issue involving Article 1, § 10, was raised by petitioner either at trial or in his Appellate Term brief. It is obvious from the opinion at Appellate Term that the court did not consider such an issue. In his Appellate Term brief, petitioner did make statements to the effect that the property in question had been sold by the City without restriction, but he made no claim that the City's regulation of the property violated Article 1, § 10. He stated in his brief (p. 12) that there were two issues at trial, one relating to double jeopardy, and the other involving whether he had complied with the order of the judge at the first criminal trial. As a consequence, this Court cannot consider the issue of Article 1, § 10. *Bryant* v. *Zimmerman*, 278 U. S. 63, 67-68 (1928); *Oxley Stave Co.* v. *Butler County*, 166 U. S. 648, 655 (1897); *Stern & Gressman, Supreme Court Practice*, § 3.26 (1969).

It is even doubtful whether this Court can consider the issue of double jeopardy. When petitioner raised the issue, he did not make reference to the Federal Constitution.

CONCLUSION

The petition for a writ or certiorari should be denied.

February 23, 1973.

Respectfully submitted,

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